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IN THE

Supreme Court of the United States

No. 602

CONNER AIR LINES, INC., F. A. CONNER, M. M. LANDY and AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Petitioners,

v.

AVIATION CREDIT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Citations to Opinions Below	1
Statement of Grounds on which Jurisdiction of This Court is Invoked	2
The Question Presented for Review	2
Rule Involved	4
Statement of the Case	5
Argument	10
Appendix A	App. 1

AUTHORITIES CITED

	Page
Barela v. **Toatle** (1901) 20 Colo. 52, 66 P. 899	13
Capital Finance Corp. v. **Oliver** (1934) 116 Fla. 790, 156 So. 736	11
Castor State Bank v. **U. S. Fidelity & Guaranty Co.** (1931) 72 La. 497, 134 So. 406	13
Carolina Portland Cement Co. v. **Baumgartner** (1930) 99 Fla. 987, 128 So. 241	13, 14
Hotop v. **Maryland Casualty Co.** (N.Y. Ct.App. 1937) 274 N.Y. 327, 8 N.E. 2d 879	12
Kurz v. **Pappas** (1934) 116 Fla. 324, 156 So. 737	14
McMullen v. **Ft. Pierce Financing & Construction Co.** (1933) 108 Fla. 492, 146 So. 567; Annotation, 169 ALR 985	11

FLORIDA STATUTES CITED

	Page
22 Fla.Jur. 538-543, Mortgages, §437-444	13
22 Fla.Jur. 287-289, Mortgages, §172 and cases cited therein	13

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TO THE HONORABLE CHIEF JUSTICE and THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on September 6, 1962, rehearing denied on October 8, 1962.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the United States District Court in and for the Southern District of Florida

in the original proceeding is unreported. The opinion of the Court of Appeals in an earlier appeal is reported in 280 F.2d 895. The opinion and judgment of the United States District Court in and for the Southern District of Florida upon remand is unreported. The opinion of the Court of Appeals as to which review is sought herein is not yet reported. The text of the opinion is attached hereto as Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

i. The date of the judgment sought to be reviewed is September 6, 1962.

ii. The date of the order denying petition for rehearing is October 8, 1962. No petition for extension of time to petition for certiorari has been applied for or granted.

iii. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

THE QUESTION PRESENTED FOR REVIEW

WHERE A LENDER IN A USURIOUS FLORIDA TRANSACTION DISGUISED A MORTGAGE AS A PURCHASE WITH AN AGREEMENT TO SELL BACK TO THE BORROWER, SO THAT THERE WAS NO MORTGAGE CONTRACT BETWEEN THE PARTIES, AND WHERE THERE WAS NO PLEDGE BY THE BORROWER OF THE RENTS AND PROFITS

OF THE MORTGAGED PROPERTY, AND WHERE IN AN ACTION BY THE LENDER TO QUIET TITLE TO THE PROPERTY A RECEIVER WAS APPOINTED ON THE APPLICATION OF THE UNITED STATES UNDER AN ASSERTED TAX LIEN LATER FOUND TO BE INVALID, AND WHERE SUBSTANTIAL RENTS WERE RECEIVED BY THE RECEIVER PENDING THE LITIGATION AND APPEAL, IS THE SURETY ON A SUPERSEDEAS BOND FILED BY THE BORROWER AND THE SURETY IN AN APPEAL BY THE BORROWER LIABLE TO THE LENDER FOR ANY SUM OVER AND ABOVE THE FULL AMOUNT OF THE DECREE APPEALED FROM PLUS INTEREST AND COSTS, IN A SITUATION WHERE THE LENDER IN A CROSS APPEAL HAS OBTAINED AN INCREASE IN THE AMOUNT OF THE ORIGINAL DECREE?

The original decree was in the sum of $417,646.16. The borrower appealed and posted supersedeas bond of $175,000.00. The lender appealed without bond. The Court of Appeals reversed on the lender's appeal and ordered the decree increased. A decree after remand was entered in the amount of $558,144.70. The trial court ordered the supersedeas bond discharged upon payment to the lender of the amount of the original decree plus legal interest thereon from the date of its entry, and plus the lender's costs. The total amount due thereunder was $462,248.64. Of this sum the lender received $449,180.50 from the proceeds of sale and rental of the property, and the balance of $13,068.14 was tendered to

the lender by the surety. The lender later appealed without any application for a stay and without any supersedeas bond. The Court of Appeals held that the surety on the borrower's appeal bond was liable for additional sums, on the basis that the rents received pending the litigation must be pro-rated between the amount of the original decree and the amount of the increase ordered by the Court of Appeals on the lender's appeal. The effect of this holding is to increase the lender's security from $462,000.00 to approximately $550,000.00, at the expense of the surety on the borrower's appeal bond.

RULE INVOLVED

The rule involved is Federal Rule of Civil Procedure 73(d), reading as follows:

> (d) Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court **may adjudge and award.** When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for

delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

STATEMENT OF THE CASE

This litigation previously was before This Court on the petition of Conner Air Lines, Inc. and F. A. Conner (the borrowers) for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit which had been rendered on June 30, 1960. The opinion of the Court of Appeals is reported in 280 F.2d 895, and the record filed with This Court in the earlier proceeding contains all the factual information which formed the backdrop for the present proceeding.

The respondent Aviation Credit Corporation, a Delaware corporation, filed suit to quiet title, seeking a declaration that it was the full legal and equitable owner of a Douglas DC-6 aircraft and its equipment. One of the defendants was the United States of America, three

individual defendants were citizens and residents of the State of Florida, and the defendant Conner Air Lines, Inc., was a Florida corporation. Jurisdiction of the United States District Court was based on diversity of citizenship and joinder of the United States of America as a defendant, and on the amount involved, to wit, $600,254.67 plus interest. No question exists as to the jurisdiction of the District Court.

Conner Air Lines, Inc. and F. A. Conner counterclaimed against plaintiff and cross-claimed against respondents L. B. Smith Aircraft Corporation, an Ohio corporation, and L. B. Smith, a citizen and resident of the State of Nevada. The defense, the counterclaim and the cross-claim were based upon a charge of usury.

Following trial before the District Court without a jury, said Court found that interest computed at the rate of 11.58% per annum, plus a $33,310.18 bonus for financing, had been included in the face principal sum of negotiable promissory notes aggregating $600,254.67, and that the aforesaid bonus had been reserved by respondents in willful violation of the Florida usury law.

The actual principal sum involved was found to have been $459,083.50, and the District Court ordered the deduction of $66,620.36, an amount equal to double the bonus for financing which had been found to have been reserved.

The United States of America and its agent Ralph Delgado were made parties defendant by virtue of seizure of the aircraft under asserted tax liens, were not parties to the appeal and are not parties to this proceeding.

Joseph G. Moretti is the holder of a mortgage encumbering the aircraft and inferior to the mortgage lien of respondent Aviation Credit Corporation.

Appeals to the United States Court of Appeals were taken by these petitioners and by respondent Aviation Credit Corporation, these petitioners contending that the District Court should have deducted the additional sum of $169,987.62, being the amount equal to double the interest exacted, to wit, $84,994.31, and Aviation Credit contending that neither the interest nor the bonus should have been doubled and deducted from the actual principal sum.

The Court of Appeals affirmed the trial court's finding of civil usury, but held that neither the interest nor the bonus had been paid by these petitioners, nor reserved, taken or exacted by respondents, within the prohibitions of Florida law.

This Court denied certiorari on the petition of Conner Air Lines, Inc. and F. A. Conner on December 5, 1960.

On return of the mandate from the Court of Appeals to the District Court, the District Court entered a final decree of foreclosure pursuant to mandate awarding judgment to Aviation Credit Corporation in the total sum of $558,144.70. At the time Aviation Credit initiated its suit, the aircraft involved was in the custody of the United States, which had seized it under an asserted tax lien (later found to be invalid). To facilitate leasing of the aircraft and to enable the aircraft to earn revenue pending the litigation, following application by the United States for the appointment of a receiver, the parties in

essence agreed to the appointment of a receiver in preference to permitting the aircraft to stand idle. The mortgagee never in any sense made any pledge to the mortgagor of the rents or profits of the aircraft, although it did not contest the accumulation of the rents and profits in the hands of the receiver or the ultimate application of these funds toward payment of the debt to Aviation Credit.

During the pendency of the litigation and the prior appeal the aircraft earned substantial revenues, and out of funds received by him from the leasing of the aircraft and from the later sale in foreclosure, the receiver received and in turn paid over to Aviation Credit approximately $450,000.00. In the meantime, the original judgment of $417,000.00 accrued interest pending the appeal, and by the time the trial court set the conditions for discharge of the supersedeas bond the interest and costs had increased the original judgment from approximately $417,000.00 to approximately $463,000.00, so that in the trial court's view a balance of approximately $13,000.00 still was due to be paid to Aviation Credit as a condition to discharge of the bond. There were minor disputes between the parties as to interest accrual and taxation of costs, but those disputes are not material in this proceeding.

The District Court ordered payment of the $13,000.00 balance and ordered that upon such payment the bond and the parties to the bond would stand discharged. Such payment was made immediately, working a discharge of the bond, but shortly thereafter the payment was returned by Aviation Credit and an appeal was taken from the order setting the conditions for discharge of the bond.

In its appeal Aviation Credit took the position that the increased judgment entered pursuant to the appellate court's mandate issued upon Aviation Credit's successful appeal should be viewed as a composite debt, part of which was secured by the mortgage (the original judgment) and part of which was unsecured (the increase ordered by the appellate court); that equity should require the bond to be applied against the less secure portion of the debt; or that in any event the court should require the bond to stand as security pro-rata between the original judgment and the increase ordered by the appellate court.

The position of the obligors on the bond was that the bond was given and conditioned only to assure full payment of the original judgment plus interest thereon and costs of the appeal, and that to hold the bond responsible beyond those limits would require the obligors on the bond to underwrite Aviation Credit's appeal rather than to protect Aviation Credit from damages resulting from Conner's appeal.

The Court of Appeals adopted a different view, holding that a mortgage contract carries with it a pledge of rents and profits; that the parties to the supersedeas bond were charged with knowledge of such pledge; and that the rents and profits should have been applied pro-rata to the original judgment and to the increase ordered following the prior appeal. There had been no argument or contention in this vein in the appellate proceeding, and in their petition for rehearing filed in the Court of Appeals these petitioners attempted to point out that there had been no mortgage contract and no pledge of rents or profits, and that under Florida law the fact of a mortgage transaction does not carry with it a pledge

of rents and profits. The petition for rehearing pointed out the conflict between the decision of the Court of Appeals and applicable Florida law, but the petition for rehearing was denied.

The District Court's original findings of fact and conclusions of law appear on pages 105 through 115 of the transcript of record in **Conner Air Lines, Inc., et al,** v. **Aviation Credit Corporation, et al,** Case No. 452, considered by this court in its October Term, 1960. The earlier opinion of the Court of Appeals appears in 280 F.2d 895. The opinion of the Court of Appeals as to which review is sought herein appears on pages 54-61 of the transcript of record herein and as Appendix A attached to this petition. On October 22, 1962, the Court of Appeals entered its order staying its mandate for a period of thirty days to enable these petitioners to apply for and obtain a writ of certiorari from This Honorable Court, the stay to continue in force until final disposition of the case by this court.

ARGUMENT

Jurisdiction of this court in the premises is based upon the fact that the United States Court of Appeals, by the decision here sought to be reviewed, has decided an important question in a way in conflict with applicable state law. U.S. S.Ct. Rule 19(b).

By adopting a rule contrary to that followed uniformly in the Florida State Courts, the Court of Appeals has created confusion and conflict in the law of mortgages and security in the State of Florida. By exposing the surety on a supersedeas bond to greater risk than

that contracted for and contemplated, and by exposing the surety to obligations over and beyond the full payment of the judgment appealed from plus interests and costs, the Court of Appeals has so confused the law of suretyship as to jeopardize sureties on appeal bonds generally and to discourage their acceptance of risk in connection with supersedeas.

Under Florida law, when Aviation Credit elected to appeal from the original foreclosure decree it thereby waived its right to a foreclosure sale until determination of its appeal. As soon as it appealed, the right to a sale was suspended, and remained suspended throughout the pendency of that appeal. **Capital Finance Corp.** v. **Oliver** (1934) 116 Fla. 730, 156 So. 736; **McMullen** v. **Ft. Pierce Financing & Construction Co.** (1933) 109 Fla. 492, 146 So. 567; Annotation, 169 ALR 985.

As long as Aviation Credit's appeal pended there was no need or function for Conner's supersedeas bond. No one can guess how much would have been realized by Aviation Credit had the foreclosure sale gone through on July 31, 1959, as scheduled, with neither side appealing. We do know that the amount would not have exceeded $417,646.16 plus interest, because that was all Aviation Credit then was entitled to.

We also know that had Aviation Credit appealed without any appeal by Conner, there would have been no appeal bond for Aviation Credit to resort to, regardless of the degree of success of such an appeal; and we know that had Conner appealed without any appeal by Aviation Credit, there could have been no increased award

ordered by the appellate court, and hence no obligation beyond the payment of $417,646.16 plus interest and costs.

The fact that there happened to be an appeal bond posted in Conner's appeal should have absolutely no effect on Aviation Credit's rights arising by virtue of the increased award to it on its appeal.

Aviation Credit had no security for the recovery of any additional award when it filed its appeal, other than the mortgage it held. There was no pledge of rents or profits, and Aviation Credit under Florida Law was not even entitled to a receivership. The fact that Conner also appealed should not entitle Aviation Credit to any rights against Conner's surety, other than those assumed by the surety in its bond.

The case of **Hotop** v. **Maryland Casualty Co.** (N.Y.C. App. 1937) 274 N.Y. 327, 8 N. E. 2d 879, involved appeals by both parties from a $15,000.00 judgment entered after a remittitur from $25,000.00. The action was one for personal injuries and the insurance company which insured the defendant also was surety on the appeal bond. The Appellate Division ordered the judgment increased to $25,000.00 and the defendant failed to pay any part of the judgment.

The plaintiff then brought two separate actions against the insurance company, one as the liability insurer, and the other as the surety on the appeal bond. The liability insurance policy carried a limit of $20,000.00. The New York Court of Appeals held that the insurance company's total exposure was the $20,000.00 policy limit and that its obligation as surety was limited to payment of

the $15,000.00 judgment from which defendant originally had appealed. The court stated that the purpose of the appeal bond was to stay execution of the $15,000.00 judgment, and that nothing in the bond could lead to an inference that either party intended that in the event of an increase in the judgment the surety would pay any additional sum. **See also: Castor State Bank v. U. S. Fidelity & Guaranty Co.** (1931) 72 La. 497, 134 So. 406; **Barela v. Toatle** (1901) 29 Colo. 52, 66 P. 899.

Aviation Credit never applied for a receiver in this proceeding, and had it so applied it would not have been entitled to one. Not even a showing of insolvency or inadequacy of security entitles a Florida mortgagee to a receiver. **Carolina Portland Cement Co. v. Baumgartner** (1930) 99 Fla. 987, 128 So. 241; 22 Fla. Jur. 541, Mortgages, §440; **See also:** 22 Fla. Jur. 538-543, Mortgages, §437-444.

In Florida, a mortgagor is regarded as the owner of the property mortgaged, with the right of possession, and is entitled to the earnings, rents and profits of the property. The mortgagee is not entitled to rents and profits as a legal incident to or as a legal right growing out of his mortgage. The mortgage does not operate per se as a pledge of the rents and profits. The mortgagee can become entitled to rents and profits only by reducing them to possession through proper legal process or by consent of the mortgagor. 22 Fla. Jur. 287-289, Mortgages, §172, and cases cited therein.

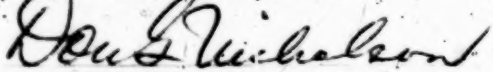
A mortgagee in Florida has only a lien upon the property mortgaged, and until foreclosure sale the mortgagor has both title and the right to possession. Even after default, the mortgagor is entitled to the rents and profits, and may appropriate them as he wishes until he

loses his equity of redemption through foreclosure sale or until the rents and profits are reduced to possession by the mortgagee after due legal process, including a showing of valid grounds therefor. Carolina Portland Cement Co. v. Baumgartner, supra, page 13; Kurz v. Pappas (1934) 116 Fla. 324, 156 So. 737.

In the instant case there never was any pledge by the mortgagor of any rents or profits to secure the mortgage debt. The rents and profits were properly appropriated at the instance of the mortgagor to payment of the original decree of the District Court. The diversion of these funds by the Court of Appeals upon the appeal of Aviation Credit is in clear conflict with all applicable Florida law, and unless reversed by this court upon grant of certiorari, the decision of the Court of Appeals will work terrible injustice and hardship upon these petitioners, and, more seriously, will preserve and foster a dual legal standard in this state between the State and the Federal tribunals.

The decision of the Court of Appeals is not in harmony with state law, and This Honorable Court can and should grant its writ of certiorari in this cause, both to secure justice for petitioners and to preserve the harmony between State and Federal decisions which so long has been pronounced and espoused by the courts of both jurisdictions.

Respectfully submitted,



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I do certify that copies of the forgoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished by mail to Smith, Ristig and Smith and to Walton, Lantaff, Schroeder, Atkins, Carson and Wahl, this 16th day of November, 1962.

Don E. Nicholson

Attorney

APPENDIX A

In The

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 19216

AVIATION CREDIT CORPORATION,
Appellant,

versus

CONNER AIR LINES, INC., F. A. CONNER, M. M. LANDY and AMERICAN CASUALTY COMPANY of READING, PENNSYLVANIA,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(September 6, 1962)

Before RIVES, JONES and GEWIN, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a judgment establishing the extent of liability under the supersedeas bond furnished by Conner Air Lines, Inc., and F. A. Conner, appellants in *one* of the appeals reported as *Conner Air Lines, Inc. v. Aviation Credit Corporation*, 5 Cir., 1960, 280 F. 2d 895. The basic facts are set forth in that opinion.

That appeal was from a decree ordering the foreclosure of a mortgage given by Conner Air Lines to Aviation Credit Corporation on a Douglas DC-6 Aircraft and eight Pratt & Whitney Aircraft Engines to secure an indebtedness found by the district court to be $417,646.16 as of June 17, 1959. Aviation Credit Corporation appealed from the same decree, and the two appeals were consolidated and heard together.

This Court held that Conner's appeal was without merit, but reversed upon Aviation Credit's appeal and remanded the cause for the entry of a decree in its favor greater in amount. Pursuant to this Court's mandate and opinion, the district court entered another decree of foreclosure on February 13, 1961, in which it ascertained the mortgage debt to be "the sum of $469,266.44 with interest from June 17, 1959 amounting to $46,379.13, plus $40,000 which the Court determines to be reasonable attorneys' fees incurred by plaintiff, plus costs in the District Court hereby taxed in the sum of $625.68, together with appellate costs in the sum of $1,873.45, making a grand total of $558,144.70." Thus, in addition to interest and costs, the district court found that the mortgage debt was more than $90,000.00 greater than that ascertained in the decree of June 17, 1959.

When the plane and engines were sold on May 5, 1961, they brought only $55,000.00. A receiver had been appointed to lease the plane and deposit the rentals in receivership. Out of the rentals the receiver paid to the mortgagee on February 14, 1961, $250,000.00, and on May 15, 1961, $150,000.00. On June 9, 1961, after the foreclosure sale, the total balance in the receiver's hands, $49,180.54, was paid to the mortgagee. Thus, the security eventually pro-

duced a total of only $449,180.50 to meet the indebtedness ascertained in the foreclosure decree of February 13, 1961 to be $558,144.70, leaving an unpaid deficiency (after calculating interest) as of June 9, 1961 of approximately $114,000.00.

When Conner appealed from the original foreclosure decree it had, pursuant to an order of the district court, filed a supersedeas bond with American Casualty Company as surety which was duly approved. That bond was in the principal sum of $175,000.00. The condition of the bond was thus stated:

> "The condition of this obligation is such that whereas the above named principals are entering their appeal to the United States Court of Appeals for the Fifth Circuit to review the Final

[1] Rule 73(d), Federal Rules of Civil Procedure:

"(d) *Supersedeas Bond.* Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal, or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay."

Decree of Foreclosure and the Findings of Fact and Conclusions of Law entered in the above styled cause, said Final Decree of Foreclosure having been entered under date of June 17, 1959, and recorded by microfilm on said date in the records of the United States District Court for the Southern District of Florida, Miami Division.

"Now, Therefore, if they, the said Conner Air Lines, Inc. and F. A. Conner, principals herein, shall satisfy the aforesaid decree or judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the said decree or judgment and such costs, interest and damages as the appellate Court may adjudge and award, then this obligation shall be null and void; otherwise to remain in full force, effect and virtue."

On the other appeal taken by Aviation Credit Corporation from the same decree, no supersedeas bond was furnished.

On the day the foreclosure sale was confirmed, the principals and surety on the supersedeas bond filed their motion for an order setting conditions for release and discharge of the supersedeas bond. They asserted that the bond was responsible only for payment of the original decree of $417,646.16 and that all sums ordered paid to the mortgagee should be applied toward satisfaction of that decree. Over the objection of the mortgagee, Aviation Credit Corporation, the district court eventually followed

that theory and ordered the supersedeas bond discharged upon payment of $13,068.14 plus interest from and after June 9, 1961. Apparently that amount was arrived at by the following calculations:

"Superseded decree of 6 17 59	$417,646.16
Received February 14, 1961	250,000.00
Principal balance	$167,646.16
Interest on $417,646.16 decree from 6 17 59 to 2 14 61	41,561.21
$27.572 per day interest on $167,646.16 from 2 15 61 through 5 15 61	2,514.68
Costs on Conner appeal only	282.07
Total	$212,004.12
Received May 15, 1961	150,000.00
Balance	$ 62,004.12
Interest at $10.19 per day to 6 9 61	244.56
Total	$ 62,248.68
Total balance in Receiver's hands— June 9, 1961	$ 49,180.54
Balance owed on bond as of 6 9 61	$ 13,068.14"

One of the contentions made at first by Aviation Credit in the district court was that since the condition of the supersedeas bond was not only to satisfy the judgment entered on June 17, 1959, but was also to satisfy in full "such modification of the said decree or judgment and such costs,

interest and damages as the appellate Court may adjudge and award," that the liability extended to cover the increase in the judgment after remand, which increase resulted from Aviation Credit's appeal. That insistence is now abandoned.[2] For that reason we do not rule on that issue, merely noting in passing that the granting of supersedeas apparently had no connection with that increase.

Instead, Aviation Credit's main insistence on this appeal is thus stated:

> "The rentals earned pendente lite and sale proceeds should have been applied first to the payment of the unsecured[3] portion of the debt represented by the increase in the decree after remand, with the balance applied to that portion of the debt represented by the original decree or, in the alternative, should have been applied pro rata."

The extent of liability under the supersedeas bond must be determined in accordance with the real or presumed intention of the parties. When it was executed all parties knew that the mortgage security covered the entire

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[2] To quote from appellant's reply brief:

> "(Appellees) argue and cite authorities to the effect that a supersedeas bond conditioned to pay a judgment cannot be extended to cover an enlarged judgment resulting from a cross-appeal. Although appellant would like to make this argument and believes that it should be the law, nevertheless appellant has not made this an issue in its appeal nor argued same in its brief.
>
> "As previously stated, appellant does not contend in this appeal that the surety's liability should be extended to cover the increase in the judgment after remand."

[3] By "unsecured" appellant evidently means not covered by the supersedeas bond.

mortgage debt, both that ascertained in the decree of June 17, 1959 and any increase might might be found as a result of the appeal of Aviation Credit. While the supersedeas bond agreed to satisfy the decree of June 17, 1959, the surety was charged with notice that payments realized from the mortgage security might go to reduce a larger mortgage debt. There is no showing or indication that the parties to the supersedeas intended that any of the proceeds of the security be diverted from one part of the mortgage debt and applied to another. Instead, they took both the decree appealed from and the mortgage contract as they found them, and with notice that on Aviation Credit's appeal it might be held that the amount ascertained in the decree of June 17, 1959 was not the full mortgage debt. We agree with appellant's alternative contention that the rentals earned pendente lite and the sale proceeds should have been applied pro rata to the payment of the amount ascertained in the decree of June 17, 1959, and to the portion of the mortgage debt represented by the increase in the decree after remand. Such application appears to us to give recognition to the intention of the parties both in the mortgage contract and in the supersedeas bond, to be just and equitable, and to be in accord with the pertinent authorities. See 40 Am. Jur., Payment, Secs. 145, 149, 150; 70 C.J.S., Payment, Secs. 69, 73; Annotation, 57 A.L.R. 2d, pp. 865 et seq.

It would appear from the calculations heretofore set out that the district court also failed to observe the rule that payments should first be applied to interest accrued to the date of payment and then to principal. 70 C.J.S., Payment, Sec. 75, p. 279. We do not agree with appellant's contention that the supersedeas bond on Conner's appeal

covered Aviation Credit's costs on its successful appeal. To carry out the conclusions here reached, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.